84-1899

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ALEXANDER L. STEVAS,
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No._____

IRENE MUELLER,

Petitioner

v.

DAVID DIEBALL, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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35 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Must a plaintiff produce evidence in opposition to a defendant's motion for summary judgment, when plaintiff relies upon the facts contained in the motion and its moving papers which in and of themselves raise triable issues of fact?

(2) Whether a cause of action exists for violation of civil rights, as encompassed by 42 U.S.C. 1983, based upon police officers' negligent spoilation or destruction of evidence, while conducting an investigation, even if the officers are acting in good faith?

PARTIES INVOLVED

Plaintiff:

(1) Estate of Irene Mueller

Defendants:

(1) J. C. Penney Company

(2) Carol J. Manstrom

(3) Valerie Rich

(4) Liberty Mutual Insurance Company

(5) Dolores Mac Carson

(6) Marijane Ramstead

(7) Ted Chatterton

(8) David Dieball

(9) Forest Scott Stanton

(10) John Kenney

(11) Michael P. Stone

(12) The City of Orange

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OPINION BELOW

On June 7, 1982, the United States District Court for the Central District of California granted a summary judgment in favor of defendants. (Appendix A) The United States Court of Appeals for the Ninth Circuit, after oral arguments and submission on December 3, 1984, filed a Memorandum Opinion on January 2, 1985. (Appendix B) A petition for rehearing before the United States Court of Appeals for the Ninth Circuit was denied on February 5, 1985.

JURISDICTIONAL STATEMENT

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) The date that the judgment which is sought to be reviewed was entered on January 2, 1985 (Appendix B);

(ii) The United States Court of Appeals for the Ninth Circuit denied a petition for hearing on February 5, 1985; and

(iii) This petition for hearing is timely in that it is filed within ninety days of the date that the petition for rehearing was denied, pursuant to 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

Fourteenth Amendment:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this sec-

tion, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be statute of the District of Columbia."

STATEMENT OF THE CASE

On January 25, 1979, Irene Mueller was confronted and detained by a J.C. Penney security guard for shoplifting four bottles of perfume. An altercation between Irene Mueller (petitioner herein, being Estate of Irene Mueller, substituted in by court order (Appendix C)) and the security guard occured which caused plaintiff to sustain physical and emotional injuries. J.C. Penney store personnel then contacted the Orange Police Department, which dispatched officers to the scene. One of the police officers, while conducting the investigation of the incident, received a business card from an eyewitness to the entire series of event. This police officer has stated that he believes he gave the business card to another police officer who was participating in the investigation. This second police officer cannot recall having received the business card from the first

officer. A third police officer then arrived and petitioner was placed under arrest and was subsequently convicted of petty theft, assault and battery.

Petitioner then brought a civil action against J.C. Penney, the security officer, and police officers for assault and false imprisonment.

In both the criminal and civil actions petitioner has claimed that the sole competent eyewitness who was crucial to her exhonoration of the criminal charges and her recovering on the civil action, was unavailable for the presentation of her cases. The unavailability of this witness was a direct and actual result of the police officers losing the only means of identifying this witness: The business card. Petitioner therefore, as a result of her conviction in the criminal action and the adverse judgment in the civil action, filed the present claim against the police offi-

cers for a violation of her civil rights pursuant to 42 U.S.C. §1983. This claim was based on the admissions of the police officers, that they had lost the identification of the only eyewitness. Petitioner has insisted that this eyewitness was crucial to her receiving a full and fair hearing in both the civil and criminal actions. The fact that the police had lost this identification was admitted in affidavits filed by the officers in support of their motion for summary judgment.

The District Court made no finding of fact as to whether the admitted loss of the evidence by the police officers interfered with the petitioner's civil rights. The court found that there was not a violation of petitioner's civil rights because neither

a conspiracy occurred nor was excessive force used against petitioner.

The District Court, in an earlier proceeding had ruled that "[b]ecause plaintiff persistently and willfully refused to be deposed by defendants. . . her testimony would be excluded at time of trial [and] that testimony also cannot be introduced into evidence in connection with defendants' Motion for Summary Judgment." (See Appendix A)

The District Court granted the summary judgment on the bas s that "Plaintiff did not appeal or contest these sanctions nor did she comply with defendants discovery request. Plaintiff therefore failed to produce any evidence sufficient to oppose defendants motion fo summary judgment." (Memorandum opinion of United States Court of Appeals for the Ninth Circuit, Appendix B page 2, lines 18-21, emphasis added.)

On September 6, 1984, the personal representative was substituted for Irene Mueller, who had died on May 23, 1984 (Appendix C).

ARGUMENT

Petitioner was convicted of petty theft on November 10, 1980. In a separate and distinct civil action petitioner brought suit against the security guard, Carol Manstrom, and her employer, J.C. Penney Co. This action was for injuries petitioner received arising out of an alleged assault which occurred during Carol Manstrom's citizen's arrest of petitioner.

In the course of the police investigation an eyewitness to the events that had transpired gave a business card to the police, so that they could contact him, in case he was needed as a witness to the events that transpired. The police officers, defendants to the action herein, lost the business card, and there with it the identification of a material witness crucial to petitioner.

As a direct consequence of the police officer's loss of the identification of this material witness, petitioner was denied a full and fair hearing in her civil action for damages for the alleged assault.

The police officers, acting under color of state law, as lawfully appointed police officers, did cause a deprivation of petitioner's right to access to courts for a full and fair hearing. Therefore, a jury could determine that the police officers are liable to petitioner for all injuries sustained by petitioner, as appropriate under 42 U.S.C. §1983.

Allegations that officers acting under color of law which prevent a plaintiff from presenting evidence, constitutes a violation of a fair trial and of due process. Henderson v. Fisher, 631 F.2d 1115 (3rd Cir. 1980). In Henderson, campus police officers seized a pair of pants from a suspect in a rape case. Before trial, a campus police

officer removed the pants from the police evidence locker, in an apparent attempt to prevent the defendant from using them as exculpatory evidence, in a defense of mistaken identity. The court held that this violated the defendant's Constitutional rights. "To deny a defendant an opportunity to present competent proof in his defense constitutes a violation of a fair trial and due process." Henderson at 1119, citing Clark v. Reid, 441 F.2d 801, 804 (5th Cir. 1971).

In Adickes v. S.H. Kress and Company, 398 U.S. 144; 90 S.Ct. 1598 (1970), the court, citing United States v. Diebold, 369 U.S. 654, 655; 82 S.Ct. 993, 994 (1962), stated that "[o]n a summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."

The Court goes on to quote from the

Advisory Committee Note on the 1963 amendment to subdivision (e) of Rule 56. In weighing evidentiary matter this Court stated "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented." (emphasis in the Court's opinion)

The court's function upon a motion for summary judgment is not to resolve issues of fact but to determine whether any material factual issues are present after resolving all questionable in favor of the party against whom the judgment is sought. DeJesus v. Ward, 441 F.Supp. 215 (S.D.N.Y. 1977) citing United States v. Matheson 532 F.2d 809; 813 (2d Cir.) cert denied 429 U.S. 823; 97 S.Ct. 75; 50 L.Ed.2d 185 (1976).

Petitioner's cause of action for civil rights violation was based on the police officers' admitted loss of the business card, which caused her to not be able to contact the sole impartial and credible witness to her arrest on January 25, 1979.

As a result of not being able to present this crucial witness in either her criminal or civil trials, petitioner did not receive a full and fair hearing sufficient to meet the due process requirements of the Fourteenth Amendment. This violation of petitioner's due process rights was directly caused by the police officers' loss of the business card.

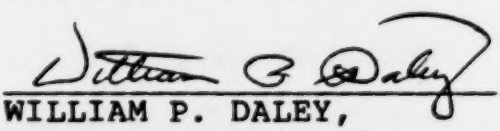
CONCLUSION

Based upon the facts, in a light most favorable to the party (petitioner) opposing the motion for summary judgment, the District Court's ruling was in error for three reasons. First, the District Court issued its ruling based on the fact that

plaintiff-petitioner did not present evidence in opposition to the motion. Secondly, the court's judgment was in error in that defendants' own admissions in their sworn affidavits, and case law, both support the proposition that the petitioner pleaded facts sufficient to constitute a cause of action not vulnerable to a motion for summary judgment. And, finally, there remain triable issues of fact that have, as yet, not been determined adequately.

We pray that Certiorari be granted to resolve the serious issues presented herein.

Respectfully submitted,



WILLIAM P. DALEY,
Attorney for the Estate
of Irene Mueller

APPENDIX A

IRENE MUELLER v. DAVID DIEBALL, et al.

United States District Court

Central District of California

Case No. CV 81-1107 TJH

Decided June 18, 1982

.....

HATTER, United States District Judge

Judgment

On June 7, 1982, the Motion for Summary Judgment of Defendants Carol J. Manstrom, Valerie Rich Johnson, Dolores Mae Carson, Marijane Ramstead, Ted Chatterton, Liberty Mutual Insurance Company and J.C. Penney Company came on regularly for hearing before the Honorable Terry J. Hatter, Jr.

Upon consideration of the moving papers submitted in support of, and in opposition

to, this motion and the oral arguments of counsel for defendants and plaintiff;

IT IS HEREBY ADJUDGED AND DECREED THAT:

There are no genuine issues of any material fact, plaintiff's case is without merit and defendants are therefore entitled to Summary Judgment as a matter of law. Plaintiff's complaint is therefore dismissed with prejudice.

Findings of Fact and Conclusions of Law

Upon consideration of the moving papers in support of defendants' Summary Judgment Motion, and oral argument of counsel for the defendants and plaintiff,

IT IS ORDERED under Fed. R. Civ. P. 56(b) that the following findings of fact and conclusions of law are without substantial controversy:

FINDINGS OF FACT

1. Probable cause existed to arrest and detain the plaintiff after she shoplifted cosmetic items from the J.C.

Penney Store in the City Mall, in Orange, on or about January 25, 1979.

2. After placing the plaintiff under citizen's arrest, J.C. Penney store personnel contacted the Orange Police Department.

3. None of the defendants used excessive force against the plaintiff during her detention.

4. Officer Kenney received a business card from an unidentified individual (identified as "Mr. X" in the criminal proceeding) which he beleives [sic] that he then gave to Officer Straton before leaving the store.

5. Officer Straton did not recall receiving this business card from Officer Kenney.

6. None of the defendants conspired to destroy this business card, nor did any of them conspire to conceal the identity of "Mr. X."

7. None of the defendants conspired to disperse witnesses connected with plaintiff's criminal trial.

8. None of the defendants committed perjury or conspired to commit perjury at plaintiff's criminal trial.

9. None of the defendants conspired to supress evidence favorable to plaintiff's defense in connection with her criminal trial.

10. There was no conspiracy between J.C. Penney Company and the City of Orange Police Officers to deprive citizens of their constitutional rights.

11. All of the individual defendants in this action acted with good faith and with the reasonable belief that their actions were legal in connection with the detention and arrest of plaintiff for shoplifting on January 25, 1979.

12. No one directed defendants Carol J. Manstrom or Marijane Ramstead on how to

testify at plaintiff's November 1980 criminal [trial.]

13. Plaintiff has willfully failed to obey previous Court orders regarding discovery efforts of the defendants.

14. The plaintiff has willfully failed to prosecute this action.

15. Any Conclusion of Law more appropriately deemed to be a Finding of Fact is incorporated herein as a Finding of Fact.

CONCLUSIONS OF LAW

1. Plaintiff is collaterally estopped from raising any claims regarding perjury of the defendants because this issue was decided in their favor during her previous criminal trial.

2. Since none of the individual defendants used excessive force against plaintiff and had probable cause to detain and arrest her, there was no violation of her civil rights under 42 U.S.C. §1983.

3. Plaintiff is collaterally estopped from raising any claims regarding probable cause, dispersion of witnesses, the loss of evidence and the existence of excessive force because she was found to be guilty of petty theft and assault and battery at her criminal trial and these issues were resolved adversely against her at that trial.

4. Because plaintiff persistently and willfull refused to be deposed by defendants, this Court ruled January 4, 1982, that her testimony would be excluded at time of trial. That testimony also cannot be introduced into evidence in connection with defendants' Motion for Summary Judgment. In addition, the testimony of Mr. Frank Marchuk is also inadmissible because it is hearsay.

5. Plaintiff has therefore failed to produce any admissible evidence sufficient to oppose defendants' Motion for Summary Judgment.

6. Plaintiff cannot maintain a cause of action against the City of Orange for violation of her civil rights because there has been no showing that the City endorsed or encouraged such conduct. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

7. Plaintiff cannot maintain a cause of action against any of the private individuals for violation of her civil rights because there has been no showing that they were acting under color of state law.

8. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be incorporated here as a Conclusion of Law.

APPENDIX B

IRENE MUELLER v. DAVID DIEBALL, et al.

United States Court of Appeals

For the Ninth Circuit

No. 82-5633

Filed January 2, 1985

.....

Appeal from the United States District Court for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted December 3, 1984

SNEED, ANDERSON and FERGUSON, Circuit Judges

Memorandum*

Plaintiff Irene D. Mueller was detained by a J.C. Penney security guard after she

* This panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, foregoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

shoplifted four bottles of perfume from the J.C. Penney store in Orange, California. J.C. Penney store personnel then contacted the Orange Police Department, which dispatched officers to the scene. One of the officers received a business card from an unidentified individual who had witnessed the altercation which took place between Mueller and the security guard when the guard requested her to return to the store. Another identified individual also witnessed the altercation. The officer receiving the card believed he subsequently gave it to another officer who replaced him at the scene. The replacement officer did not recall receiving the card, and the card was never found. Another police officer then arrived at the scene and Mueller was arrested. She confessed to shoplifting the perfume.

Mueller was subsequently convicted of petty theft, assault and battery. She was

sentenced to three years' probation with a $250.00 fine. Mueller unsuccessfuly appealed her conviction.

Mueller then brought an action pursuant to 42 U.S.C. §1983, naming various police officers, the City of Anaheim [Orange], certain J.C. Penney security personnel, Liberty Mutual Insurance Company and J.C. Penney Company, Inc. as defendants. She alleged violation of her civil rights based on the shoplifting incident. The defendant moved for summary judgment. Because Mueller refused to be deposed by the defendants, the district court ruled that her testimony could not be introduced into evidence in connection with the defendants' motion for summary judgment nor at the time of trial. Plaintiff did not appeal or contest these sanctions nor did she comply with defendants' discovery requests. Plaintiff therefore failed to produce any evidence sufficient to oppose defendants' motion for

summary judgment. The district court thus found that there were no genuine issues of fact and concluded that the defendants were entitled to summary judgment as a matter of law. Mueller appeals.

We find the district court's grant for summary judgment appropriate. Plaintiff cannot maintain a cause of action under §1983 against any of the private individuals because there has been no showing that they were acting under color of state law. See Fonda v. Gray, 707 F.2d 435, 438-39 (9th Cir. 1983). She cannot maintain a cause of action against the City of Orange because there has been no showing that she is basing the alleged liability of the city on other than a respondeat superior theory. See Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). Finally, plaintiff cannot maintain a cause of action under §1983 against defendant police officers because the unopposed evidence submitted by

the officers demonstrated they acted in good faith. See Pierson v. Ray, 386 U.S. 547, 555-58 (1967) (police officers are not liable for monetary damage under §1983 if they acted in good faith and with probable cause); Smiddy v. Varney, 665 F.2d 261, 266-67 (9th Cir. 1981), cert. denied, 459 U.S. 829 (1982).

Therefore, because plaintiff failed to produce any evidence sufficient to oppose defendants' motion for summary judgment, we hold that summary judgment was properly entered against her pursuant to Rule 56(e) of the Federal Rules of Civil Procedure.

AFFIRMED

APPENDIX C

IRENE MUELLER v. DAVID DIEBALL, et al.

United States Court of Appeals

For the Ninth Circuit

No 82-5633

DC CV 81-1107-TJH

Filed February 5, 1985

.....

SNEED, ANDERSON and FERGUSON, Circuit Judges.

Order

The petition for rehearing is DENIED.

APPENDIX D

IRENE MUELLER v. DAVID DIEBALL, et al.

United States Court of Appeals

for the Ninth Circuit

No. 82-5633

DC CV 81-1107 TJH

Filed September 6, 1984

.....

BARNES, Circuit Judge

Order

The motion filed on August 23, 1984 to substitute appellant's personal representative pursuant to Fed. R. App. P. 43(a) for appellant, who died on May 23, 1984 while the appeal was pending, is granted.

CERTIFICATE OF SERVICE

I, William P. Daley, Esq., certify that on or before the May 28, 1985, I mailed, postage prepaid, 40 copies of this Petition for Certiorari to the Clerk, U.S. Supreme Court, and mailed one copy, postage prepaid to Office of the Clerk, Court of Appeals, P.O. Box 547, San Francisco, California, 94101; one copy, to Cotkin, Collins, Kolts and Franscell, 550 S. Hill Street, Suite 1300, Los Angeles, California, 90013; and one copy to David Highman, P.O. Box 1786, Newport Beach, California, 92660.

William P. Daley

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-1899

IRENE MUELLER,

Petitioner,

vs.

DAVID DIEBALL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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and THE CITY OF ORANGE

BEST AVAILABLE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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and THE CITY OF ORANGE

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 84-1899

IRENE MUELLER,

PETITIONER,

vs.

DAVID DIEBALL, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW, respondents, DAVID DIEBALL, MICHAEL P. STONE, FOREST SCOTT STANTON, JOHN KENNEY, and THE CITY OF ORANGE, and oppose the Petition for Writ of Certiorari filed by the petitioner, THE ESTATE OF IRENE MUELLER.

Pursuant to Rule 22, Rules of the Supreme Court of the United States, respondents submit the following Brief in Opposition:

GROUNDS WHY CASE SHOULD NOT BE REVIEWED BY THIS COURT

1. The petitioner is collaterally-estopped from raising the issue of negligent loss of evidence because this issue was raised and resolved adversely against her at her criminal trial;

2. There is no Federal jurisdictional basis for the common law tort of negligent failure to preserve evidence;

3. Under Harlow v. Fitzgerald, 457 U.S. 800 (1983), the individual respondent police officers are immune from the petitioner's claims;

4. Under Monell v. Department of Social Services, 436 U.S. 658 (1978), the

respondent City of Orange is immune from the petitioner's claim;

5. Under Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1938 (1985), the petitioner's claims are barred by the applicable state statute of limitations as untimely.

PARTIES INVOLVED

Plaintiff:

(1) Estate of Irene Mueller

Defendants:

(1) J. C. Penney Company

(2) Carol J. Manstrom

(3) Valerie Rich

(4) Liberty Mutual Insurance Company

(5) Dolores May Carson

(6) Marijane Ramstead

(7) Ted Chatterton

(8) David Dieball

(9) Forest Scott Stanton

(10) John Kenney

(11) Michael P. Stone

(12) The City of Orange

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STATEMENT OF THE CASE

On January 25, 1979, the petitioner, Irene Mueller, went shopping in a J. C. Penney Store located in the City Mall in Orange. While in the cosmetics department, she shoplifted four perfume bottles by placing these items in her purse without paying for them. Upon exiting the store, the petitioner was stopped by a J. C. Penney security officer, Carol Manstrom. Ms. Manstrom had seen the petitioner shoplift the perfume bottles. Carol Manstrom identified herself as a security officer and requested the petitioner to return to the store.

The petitioner refused to return to the store and instead attacked Ms. Manstrom. Both a construction worker (Michael Anderson) and an unidentified man (referred to in the later criminal trial as "Mr. X") witnessed this assault and separated the women.

Subsequently, the petitioner, Ms. Manstrom, and Mr. X re-entered the store. At that time, the petitioner was informed by the J. C. Penney personnel that she was under citizen's arrest. The petitioner was escorted to a security office in the store. J. C. Penney personnel informed the Orange Police Department that a suspect was in custody for theft, assault and battery upon a store security officer.

In response, the Orange Police Department sent Officer Kenney to the store. Since Officer Kenney's shift was about to end, the Orange Police Department later dispatched a replacement officer (Officer Stanton). In the interim, Officer Kenney communicated with Mr. X and took a business card from the individual. Mr. X was in the security office for approximately twenty minutes, conversing with the petitioner and making a telephone call to his employer.

Prior to leaving, Officer Kenney believes that he gave the business card to Officer Stanton.

Officer Stanton then read the petitioner her Miranda rights, which she chose to waive. She confessed to Officer Stanton that she had shoplifted the items because she had been unable to find anyone to help her in the store. Detective Dieball also arrived and he received permission from Officer Stanton to step into the outer hallway with the petitioner to obtain her side of the assault incident outside the presence of Carol Manstrom (who was located in the security office).

During this time, Carol Manstrom completed a "Store Report of Apprehension" and a "Order of Arrest by a Private Person." She signed both of these reports and provided Officer Stanton with copies. Subsequently,

Officer Stanton escorted the petitioner to his police vehicle. The petitioner was taken to the Orange Police Department, where she was booked and then released.

On January 29, 1979, a criminal complaint was filed against the petitioner alleging three counts: (1) petty theft under California Penal Code §484-§488, (2) assault under Penal Code §240 and (3) battery under Penal Code §242. Prior to trial, the petitioner made several motions. One motion was to have her confession to Officer Stanton ruled inadmissible because it was involuntary. This motion was denied.

A second motion was made to dismiss the pleadings on the theory that the prosecution had failed to produce a material witness (a Hitch-type Motion). The witness was the above-referenced Mr. X, who witnessed the petitioner's assault and battery of Carol

Manstrom. A hearing was conducted during which the Court heard testimony from Irene Mueller, Carol Manstrom, and Officers Dieball, Stanton, and Kenney. On January 31, 1980, this motion was denied by the Honorable Barbara Tamm Thompson. In so ruling, Judge Thompson made the following four explicit findings of fact:

> "(1) Defendant had ample opportunity to discover X's name and address. Credible evidence demonstrates that defendant was not prevented from conversing with X, and did engage in conversation with him for approximately 20 minutes; (2) defendant's mistaken belief that the police would obtain X's identity is not sufficient justification to excuse defendant from the responsibility of safeguarding her own interests, or to cause the police officers to serve as defense investigators; (3) credible evidence demonstrates that defendant was able to determine that X was a teacher like herself, and that he had possibly taught in Pasadena. Credible evidence also shows the defendant was able to listen to X's phone conversation with his place of employment and, as a result, was able to determine that he may work at St. Joseph's Hospital. Such ability indicates the defendant was not suffering from such physical or mental distress as to be unable to determine X's identity;

and (4) credible evidence demonstrates that the loss of X's card by the police was unintentional and was not tainted with the degree of wrongdoing set forth in the above-cited cases. Credible evidence further demonstrates that X's card is valueless as it did not contain an address or telephone number for X." (A copy of these findings is attached hereto as Appendix A.)

On November 3 through November 10, 1980, the criminal trial of the petitioner was conducted. Following deliberation, the twelve member jury found the petitioner guilty on all three counts. The Court thereafter sentenced the petitioner to three years probation and a $250.00 fine. Thereafter, the petitioner appealed her criminal conviction to the Appellate Division, Superior Court, State of California, on the theory that (1) the Trial Court erroneously refused to dismiss the case on a Hitch-type motion (i.e., the police had destroyed evidence material to her guilt, consisting of the unidentified witness's

business card), and (2) the Court erroneously refused to charge the jury with several requested sets of instructions.

Upon denial of this appeal, the petitioner unsuccessfully pursued her appeal all the way to the California Supreme Court, which denied her Petition for a Writ of Certiorari on or about November 13, 1981. The petitioner then filed a Petition for a Writ of Certiorari with the United States Supreme Court to review the propriety of the criminal conviction. On or about March 22, 1982, the petition was denied. (See Appendix B.)

Since that time, the petitioner and her husband, Mr. Frank Marchuk, have vexaciously filed the instant Federal Court lawsuit as well as numerous State Court lawsuits essentially challenging the

shoplifting convction.[1/] The five State Court actions consist of: (1) Mueller v. J. C. Penney Company, et al., Orange County Superior Court Case No. 31-26-58; (2) Marchuk v. J. C. Penney Company, Inc., et al., Orange County Superior Court Case No. 31-43-69; (3) Mueller v. Manstrom, et al., Orange County Superior Court Case No. 33-97-73; (4) Marchuk v. Patrick Quinlivan, et al., Orange County Superior Court Case No. 32-66-40: and (5) Marchuk v. Dieball, et al., Orange County Superior Court Case No. 36-64-11. Four of these cases have proceeded to trial with the petitioner and her husband losing and, in fact, in one case having $15,000.00 punitive damages assessed against the petitioner by the jury; these verdicts

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1/ The petitioner and her husband also filed State Bar Complaints against these respondents' counsel, Mr. Bradley C. Withers, and against counsel for the J. C. Penney group of defendants. The State Bar subsequently found these charges without merit.

are currently on appeal. The respondent City of Orange and its police officers successfully were dismissed from the fifth State Court lawsuit, Marchuk v. Dieball, et al., with that action currently pending against the other respondents, J. C. Penney, and its various employees.

The instant Federal Court lawsuit was filed on March 16, 1981. Both sets of respondents thereafter filed Summary Judgment Motions, which the District Court granted on June 7, 1982. The District Court made numerous explicit findings of fact and conclusions of law. These included findings that the respondents did not conspire to deprive the petitioner of her constitutional rights [Findings of Fact Nos. 6, 7, 8, 9, and 10] and that all the respondents acted in good faith at all relevant times [Finding of Fact No. 11]. (See Appendix C.)

The District Court's conclusions of law included findings that the petitioner was collaterally estopped to raise claims regarding the loss of Mr. X's business card because that issue was decided adversely to her at the criminal trial [Conclusion of Law No. 3]. Also, the District Court found that as a matter of law the City could not be found liable on a Monell theory. [Conclusion of Law No. 6.] (See Appendix C.)

Earlier, the District Court ordered that the petitioner's testimony not be introduced into evidence in connection with the Summary Judgment Motion or at the time of trial because of the Petitioner's continued willful failure to submit to deposition. The petitioner did not appeal or contest the District Court's sanctions in this regard. The District Court with respect to the Summary Judgment Motions further found that the petitioner had willfully failed to

prosecute her action by her misconduct [Finding of Fact No. 14]. (See Appendix C.)

ARGUMENT

A. THE PLAINTIFF IS COLLATERALLY ESTOPPED FROM RAISING THE ISSUE OF NEGLIGENT LOSS OF EVIDENCE BECAUSE THIS ISSUE WAS RAISED AND RESOLVED ADVERSELY AGAINST HER AT HER CRIMINAL TRIAL

The sole substantive issue for review raised by the petitioner is whether she can properly state a federal civil rights action based upon the alleged negligent loss of Mr. X's business card by Officers Kenney and Stanton. The petitioner essentially argues that although she did not submit competent counter-affidavits on this point due to her willful failure to obey previous Court orders, the affidavits of the

respondent officers in support of the Summary Judgment Motion creates a genuine issue of fact in this regard. The petitioner argues that card of Mr. X was negligent and proximately caused the petitioner's damages, so as to preclude the granting of Summary Judgment in favor of these respondents.[2/]

This is not true. In Conclusion of Law No. 3, the District Court explicitly found that the petitioner was collaterally estopped from raising any issue about "the loss of evidence" because that issue was

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2/ The scope of the petitioner's argument is limited to negligent destruction of evidence, and not intentional destruction. The District Court explicitly found that none of the defendants conspired to destroy the business card or suppress the identity of Mr. X. (Appendix C, Findings of Fact Nos. 6 and 9). Since there is no rebuttal evidence at all concerning these findings, the petitioner is precluded from contending at this point that a genuine issue exists whether the alleged loss of the business card was intentional.

adversely decided against her in the criminal trial. As is evidenced by the Criminal Trial Court's findings (see Appendix A hereto), the Trial Court explicitly found that "credible evidence. . .does not demonstrate that there is a reasonable possibility that X is a material witness to the petty theft charge". Since the Trial Court found that as a matter of law Mr. X was not a material witness to the petty theft charge, the petitioner is collaterally estopped from alleging a negligence claim because one vital element of the claim -- proximate causation -- is therefore missing. See Duncan v. Nelson, 466 F.2d 939 (7th Cir., 1972), cert. den., 93 S.Ct. 116, 175 (1972).

In Allen v. McCurry, 49 U.S. 90 (1980), this Court held that the affirmative defenses of res judicata and collateral estoppel are fully applicable in federal civil rights actions. In Allen, the

plaintiff was charged with unlawful possession of heroine and assault upon a police officer with intent to kill. The plaintiff unsuccessfully brought a suppression motion to exclude certain evidence during his criminal trial and he was thereafter convicted on both counts. Subsequently, the plaintiff brought a damage action under Title 42 U.S.C. §1983 alleging that certain under cover police officers and the City of St. Louis had violated his Fourth Amendment right prohibting unconstitutional searches and seizures. The Supreme Court affirmed the District Court's Summary Judgment for the defendants, noting that collateral estoppel prevented the plaintiff from relitigating search and seizure questions because it had already been decided against him in the State criminal proceedings.

Here, the Criminal Trial Court's finding that Mr. X was not a material witness to the shoplifting incident must be given preclusive effect. The petitioner appealed her criminal conviction on this very issue up through the California Supreme Court up to this Court, without success. Such preclusive effect is the death knell for the petitioner's attempt to state a valid federal civil rights claim.[3/]

3/ The state tort of negligent failure to preserve evidence must, in general terms, be based upon the existence of a promise to preserve evidence and reasonable reliance thereon by the complainant. Williams v. State of California, 34 Cal.3d 18, 25; 192 Cal. Rptr. 233 (1983). In the present case, the other findings by the Criminal Court operate to bar the petitioner's claim, in that it was found that the petitioner did not reasonably rely upon the respondent officers to obtain identity information concerning Mr. X. (Appendix C.)

B. THERE IS NO FEDERAL JURISDICTIONAL BASIS FOR THE COMMON LAW TORT OF NEGLIGENT FAILURE TO PRESERVE EVIDENCE

Even if the petitioner could somehow evade the collateral estoppel effect of the Criminal Trial Court's determination regarding the loss of Mr. X's business card, the instant Petition is defective in that no jurisdictional basis exists for the common law tort for negligent failure to preserve evidence.

This common law tort, recognized in California in extremely limited situations with respect to police officers, does not rise to the dignity of a federal civil rights violation. See generally Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979). The petitioner apparently believes that the loss of evidence constitutes a

violation of her right to a fair trial and due process.

The petitioner relies upon Henderson v. Fisher, 631 F.2d 1115 (3rd Cir., 1980) as support for her contention. Henderson, however, involved in the alleged intentional destruction of material evidence. The decision is silent on such salient points as to whether this alleged intentional destruction of evidence was raised in the criminal proceedings, or whether adequate state tort remedies existed for the plaintiff's claims.

This Court's decisions since the date of the Third Circuit's ruling in Henderson demonstrate that no cognizable constitutional right is implicated with respect to the petitioner's negligence claim concerning the loss of Mr. X's business card. The petitioner was provided with full due

process in that she raised this issue with the Trial Court and then unsuccessfully pursued relief up the appeal ladder. Furthermore, the petitioner has all along possessed an adequate state tort remedy to sue the respondents for negligent preservation of evidence under Williams v. State of California, 34 Cal.3d 18, 192 Cal. Rptr. 233 (1983), and the cases cited therein.

Thus, the existence of adequate state criminal and tort remedies satisfy the constitutional concerns raised by the petitioner. The alleged negligent failure to preserve evidence by the respondent officers constitutes the very type of "random and unauthorized" actions which renders a pre-deprivation hearing impracticable. Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). By her argument, the petitioner would have this

Court improperly reduce §1983 to a "font of tort law". See also Hudson v. Palmer, _____ U.S. _____, 104 S.Ct. 3194 (1984).

Accordingly, the petitioner's federal civil rights claims are barred due to the abundantly-adequate remedies, both criminal and civil, available to her following her shoplifting arrest and conviction.

C. UNDER HARLOW v. FITZGERALD, 457 U.S. 800 (1982), THE INDIVIDUAL RESPONDENT POLICE OFFICERS ARE IMMUNE FROM THE PETITIONER'S CLAIMS

Independent of the foregoing considerations, the petitioner still fails to state a valid claim against the respondent police officers due to the District Court's unchallenged finding that their actions were at all times in good faith. Under Harlow v.

Fitzgerald, 457 U.S. 800 (1982), this immunizes the respondent officers from the plaintiff's claims. Thus, even if the petitioner's "failure to preserve evidence" allegation somehow were found to constitute the basis for a federal civil rights claim, the suit against the respondent officers is nevertheless barred because of the District Court's finding of good faith.

D. UNDER MONELL V. DEPARTMENT OF SOCIAL SERVICES, 436 U.S. 658 (1978), THE RESPONDENT CITY OF ORANGE IS IMMUNE FROM THE PETITIONER'S CLAIMS

Just as with the individual police officers, the petitioner's claim against the respondent City of Orange is similarly barred due to the District Court's unchallenged finding that the City is not liable under the parameters of Monell v. Department of Social Services, 436 U.S. 658 (1978). Even

if one finds merit with the petitioner's allegation that the alleged negligent loss of Mr. X's business card qualifies as a federal civil rights violation, suit would nevertheless be barred against the City given the District Court's finding on the Monell issue.

Thus, the City is similarly immune from liability in this matter.

E. UNDER WILSON v. GARCIA, ____ U.S. ____, 105 S.Ct. 1938 (1985), PETITIONER'S CLAIMS ARE BARRED IN THE FIRST INSTANCE AS UNTIMELY

In Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1938 (1985), this Court recently held that each state's statute of limitations for personal injury actions applies to federal civil rights claims. In California, a one year statute applies to personal injury

claims under California Code of Civil Procedure §338. Under Wilson v. Garcia, therefore, a one year statute of limitations applies to federal civil rights arising in California.

The petitioner's federal civil rights suit was filed on March 16, 1981. The alleged negligent loss of evidence occurred over two years earlier during the time of the petitioner's arrest on January 23, 1979. Accordingly, the petitioner's federal civil rights claim is barred in the first instance as untimely. For this additional reason, the instant petition merits denial.

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CONCLUSION

Based upon the foregoing reasons, the respondents respectfully submit that vertiorari should not be granted in this matter.

DATED: September 5, 1985.

Respectfully submitted

COTKIN, COLLINS, KOLTS & FRANSCELL

By Bradley C. Withers
BRADLEY C. WITHERS
Attorneys for

APPENDIX A -- ORDER DENYING MOTION TO DISMISS OF THE HONORABLE BARBARA TAMM THOMPSON

EXHIBIT "A"

FILED
MUNICIPAL COURT
CENTRAL ORANGE COUNTY JUDICIAL DIST.
JAN 31 1980
EDWARD W. CADEK, CLERK
By _____ DEPUTY

MUNICIPAL COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
IRENE DOROTHY MUELLER, Defendant

No. 79CM00607

ORDER DENYING MOTION TO DISMISS

Defendant's motion to dismiss Counts I and II of the Complaint having come for hearing on January 28, 1980, before the Honorable Barbara Tam Thompson, E. Wallace Dingman, Deputy District Attorney, appearing on the behalf of the people, and Mary A. Stern appearing on behalf of Irene Dorothy Mueller.

The Court having considered oral argument, testimony, and the points and authority cited by the parties, the Court now makes the following findings:

The Defense has demonstrated a reasonable possibility that the man in a leisure suit (hereinafter referred to as "X") is a material witness to the assault and battery. Credible evidence, however, does not demonstrate that there is a reasonable possibility that X is a material witness to the petty theft charge.

APPENDIX "A"

(1977) 75 Cal.App. 3d 444; and People vs. Flores (1976) 62 Cal.App. 3d Supp. 19 has not been satisfied. The Court bases this conclusion upon the following grounds:

First, Defendant had ample opportunity to discover X's name and address. Credible evidence demonstrates that Defendant was not prevented from conversing with X, and did engage in conversation with him for approximately 20 minutes.

Second, Defendant's mistaken belief that the police would obtain X's identity is not sufficient justification to excuse Defendant from the responsibility of safeguarding her own interests, or to cause the police officers to serve as defense investigators.

Third, credible evidence demonstrates that Defendant was able to determine that X was a teacher like herself, and that he had possibly taught in Pasadena. Credible evidence also shows the Defendant was able to listen to X's phone conversation with his place of employment and, as a result, was able to determine that he may work at St. Joseph's Hospital. Such ability indicates the Defendant was not suffering from such physical or mental distres as to be unable to determine X's identity.

Fourth, credible evidence demonstrates that the loss of X's card by the police was unintentional and was not tainted with the degree of wrongdoing set forth in the above-cited cases. Credible evidence further demonstrates that X's card is valueless as it did not contain an address or telephone number for X.

APPENDIX "A"

Based on the foregoing reasons, the Court denies Defendant's motion to dismiss the petty theft as well as the assault and battery charges.

Dated: January 31, 1980

Judge of the Central Municipal Court

I HEREBY CERTIFY that the foregoing instrument is a true copy of the original on file in this office
ATTEST my hand this 4th day of [illegible] 82
ROBERT B. [illegible]
Clerk of the Municipal Court, County of [illegible]
Deputy

APPENDIX "A"

APPENDIX B -- PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

IRENE MUELLER,

Petitioner

vs.

CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

COURT OF APPEALS

OF THE

STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION 1

IRENE MUELLER
1311 B S. Anaheim
Anaheim, California
92805
(714) 772-5120

In Pro Per

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

IRENE MUELLER,

Petitioner

vs.

CALIFORNIA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE

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FOURTH APPELLATE DISTRICT

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1311 B S. Anaheim
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In Pro Per

APPENDIX "B"

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APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

ENE MUELLER, Petitioner, v. ALIFORNIA, Respondent	PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT DIVISION 1

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW IRENE MUELLER, IN PRO PER, and petitions this Honorable Court for a Writ of certiorari directed to the Court of Appeals of the State of California Fourth Appellate, Division 1

Pursuant to Rule 23, Rules of the Supreme Court of the United States, Petitioner submits the following:

APPENDIX "B"

(a)

OPINION BELOW

There was no official or unofficial report published by the California Court of Appeals.

(b)

JURISDICTION

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) The date that the judgment which is sought to be reviewed was entered in August 24, 1981.

(ii) The Supreme Court of California denie a petition for hearing on October 7, 1981, and all state remedies have been exhausted. (Exhibit "E")

(iii) The statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C. 1257(3) which provides:

Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

.By writ of certiorari, where the validity of
treaty or statute of the United States is drawn
question or where the validity of a state statute
drawn in question on the ground of its being
pugnant to the Constitution, treaties or immunity
specially set up or claimed under the Constitu-
on, treaties or statutes of, or commission held
authority exercised under, the United States.
ne 25, 1948, c. 646,62 Stat. 929.

(c)

QUESTIONS PRESENTED FOR REVIEW

Whether a criminal defendant in a state
secution for misdemeanor assault and battery,
petty theft, was denied due process of law
er the 14th amendment when an investigating
liceman, acting as a state representative, will-
ly, negligently or inadvertantly suppressed
usiness card containing at least the name of
aterial witness for the defense when such evi-
ce was requested by petitioner as in the
ning of Brady v. Maryland 373 U.S. 83,87.

APPENDIX "B"

2. Whether evidence which might be helpful to a criminal defendant and which is suppressed by the police would result in a denial of due process as in Mooney v. Holohan 294 U.S. 103,112.

3. Whether a criminal defendant is entitled to a dismissal of a criminal case is justified where the lost evidence is so vital to the defens of the case that a fair trial is impossible without it; that the lack of such evidence deprives the defendant of her fundamental constitutional rights to a fair trial. State v. Heath 147 F.Sup 877.

(d)

UNITED STATES CONSTITUTIONAL AMENDMENTS INVOLVED

Fourteenth Amendment-

"All persons or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the stat wherein they reside. No state shall make or enfo any law which shall abridge the privileges or immunities of citizens of the United States; nor

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ll any State deprive any person of life, liberty, property, without due process of law; nor deny any person within its jurisdiction the equal tection of the laws."

(e)

STATEMENT OF THE CASE WITH FACTS MATERIAL THE CONSIDERATION OF THE QUESTIONS PRESENTED:

On January 25, 1979, Petitioner exited a . Penny's store in Orange County, California, rying cosmetic items from the store in her purse.

Petitioner was confronted by a security rd for the store, a Miss Carol Manstrom, and cuffle ensued between the two women.

Thereafter, a man intervened and separated two women. The man's identity was not dis- ered before trial, and it remained unknown at itioner's hearing to dismiss charges.

The identity of the man remains unidentified this day and is the issue of this writ. lible evidence (Exhibit "A" p. 3 & "D" p. 3) s that this unidentified man, referred to

APPENDIX "B"

APPENDIX "B"

by investigating officers, Petitioner was unable to secure witness "X" as a possible favorable witness to her defense.

PETITIONER'S CONTENTION OF WITNESS "X's" MATERIALITY AS TO THE PETTY THEFT:

11. Judge Thompson ruled, as stated above, that witness "X" was not a material witness as to the petty theft charge. However, Petitioner unequivocally stated to the Honorable Judge Frank that witness "X" was in her proximity when she placed the twenty dollars down on the counter. (Exhibit "D" p. 1) There was no credible evidence produced by the prosecutor to refute petitioner's assertion or to establish that the witness was not in the same area as petitioner.

12. Officer Kenny testified at Petitioner's trial that witness "X" could have mentioned to him the possibility of observing other things. Therefore, creating a major inference that witness "X" could have seen the petty theft incident. (Exhibit "C" p. 5)

APPENDIX "B"

APPENDIX "B"

REASONS FOR GRANTING WRIT OF CERTIORARI

13. Petitioner was denied her constitutional rights under the Fourteenth Amendment when her direct appeal was denied by the California Court of Appeals, Second Appellate District.

14. On October 7, 1981, the California Supreme Court denied a Hearing. (Exhibit "G")

The foregoing is presented in satisfaction of Rule 23 (f) Rules of the Supreme Court of the United States.

(h)

ARGUMENT

I

WAS PETITIONER DENIED HER DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT BECAUSE OF THE FAILURE OF THE INVESTIGATING OFFICER TO PRESERV THE BUSINESS CARD CONTAINING THE NAME AND ADDRESS OF A POSSIBLE FAVORABLE WITNESS.

Petitioner defense rested on the testimony of witness "X", who observed the assault and

battery and quite possibly the petty theft. Petitioner testified that the witness was extreme helpful towards her during the time after the abr encounter with the security guard (as stated in Exhibit "D" p. 3)

Petitioner has provided direct evidence to refute the findings of the Honorable Thompson as to the materiality of the business card to the defense. First, one can logically conclude that witness "X" gave his card to the police officer because he wanted to be a witness; he wanted to inform the police as to his observation of the incidences.

Secondly, the Honorable Thompson was misinformed as to the fact that the card only contai the name of the witness. As Petitioner has shown already, Officer Kenny, who was the first person to receive the card from the witness, has testifi that the business card did in fact contain not only the name, but also the address and phone numb of the witness.

APPENDIX "B"

Further, Petitioner IRENE MUELLER, has testi-
d that the Witness was in her proximity when
placed the twenty dollars on the counter;
refore, providing direct evidence that the
ness was also material as to the petty theft
rge. (Exhibit "D" p. 1)

Consequently, since the Honorable Thompson
her order to dismiss found the witness material
the the assault and battery charges and Petitione
testified under oath that the witness was near
in the store, to which the prosecutor could
refute, a reasonable person could conclude
t witness "X" was material as to the petty theft

In fact, not only was the witness material
to the petty theft, the business card that con-
ned the name, address and phone number of the
ness was, and is, material as to the defense.
hout the business card, Petitioner was unable
locate witness "X" as a possible witness for
defense; thereby, denying her a fair trial.

APPLICABLE LAW

I

The suppression by the prosecutor at the trial of evidence favorable to an accused violate due process where the evidence is material either as to guilt or punishment, irrespective of the good or bad faith of the prosecutor. Brady v. Maryland 373 U.S. 83,10 L.ED2d 215,83 S.Ct. 1194

Negligent suppression of material evidence by the government entitles a defendant to a new trial. State v. Heath 147 F.Supp. 877

> Heath decision stands for the principle that an outright dismissal of a criminal case is justified where the lost evidence is so vital to the defense of the case that a fair trial is impossible without it.
>
> In other words, in order for a defendant to be entitled to dismissal of a criminal charge on the basis of lost or destroyed evidence he must establish the critical nexus of materiality...materiality must be shown to the extent that the lack of such evidence deprives the defendant of his fundamental Constitutional rights to a fair trial.

In order for a conviction to be voided on account of suppression of evidence, it need not

pear that the prosecuting attorney was privy;
is sufficient if the suppression is by investi-
ting officers. Police are also part of the
osecution, and the taint on the trial is no less
they, rather than the state's attorney were
lty of the nondisclosure.

Failure of the police to reveal such material
dence in their possession is equally harmful
a defendant whether the information is purposely,
negligently, withheld. Barbee v. Warden 331
.R. 846, Walker v. Bishop 235 F.Supp. 767,
dy v. Maryland 373 U.S. 83, 83 S. Ct. 1194,
L.Ed.2d 215, Napue v. Illinois 360 U.S. 264,
S.Ct. 1173, 3 L.Ed.2d 1217

In United States v. Bryant 439 F.2d 642,
it was ruled that the government has a duty
reserve evidence that is material. "Hence,
old that before a request for discovery has
made, the duty of disclosure is operative
duty of preservation. And if government is
ative of that duty, it is a denial of that
ndant's due process rights."

II

Under California law, it does not make any difference whether the material evidence that is suppressed is done so willfully, negligently, or inadvertantly when it is done by a state agent representative if the suppressed evidence affects directly the question of guilt, the degree or amo of prejudice is not to be weighed or measured by the federal harmless error rule of Chapman v. California, 386 U.S. 18, 24, 17 L.Ed2d 705, 87 S. Ct. 824; if the suppressed evidence affects direc the question of guilt, the sole question is mater iality, and if found material, the judgment of conviction must be reversed.

In People v. Ruthford, 14 Cal 3rd 399,406, Chief Justice Wright, speaking for a unanimous Court, said:

> "We note, preliminarily, that when the evidence which is suppressed or otherwise made unavailable to the defense by conduct attributable to the State bears directly on the question of guilt our initial inqui is whether such conduct resulted in denial of a fair trial. If so, the judgment of conviction must be reversed without weighi

the degree of the prejudice to the accused. (Pyle v. Kansas 1942) 317 U.S. 213,216 87 L.Ed 214,216, 63 S.Ct. 177; In Re Imbler (1963) 60 Cal. 2d554, 567 (35 Cal. Rptr. 293,387 P.2d 6) wherein we stated: 'Moreover, suppression by the state of material evidence alone deprives a defendant of due process of law. It is necessary in such circumstances, of course, that the materiality of the evidence suppressed or otherwise not disclosed be examined in order that we may judge whether an accused has been fairly tried, but that examination is one which goes to the question of the evidence rather than prejudice to the accused.'

We conclude that the suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process within the meaning of the Fourteenth Amendment. Chapman v. California (1967) 386 U.S. 18,24 (17L.Ed 2d 705,710-711, 87S.Ct.824)"

In the case at bar, investigating Officer

y was given a business card by witness "X"

aining at least the name of a material witness

he incidences that arose between the Petitioner

the security guard. Officer Kenny has stated

rial that the business card contained all the

ntial requirements to make the card material:

, address, and phone number.

The card was given to the police officer

APPENDIX "B"

and then mysteriously disappeared. Thereby, dep
ving Petitioner of an essential part of her defe
and also has denied her due process rights under
the Fourteenth Amendment of the United State
Constitution.

We pray that Certiorari be granted to
resolve the serious constitutional issues present
herein.

Respectfully submitted,

IRENE MUELLER

In Pro Per

APPENDIX "B"

APPENDIX C -- FINDINGS OF FACT AND CONCLUSIONS OF LAW

FILED
...2 1982
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IRENE D. MUELLER,

Plaintiff,

vs.

DAVID DIEBALL, et al.,

Defendants.

CASE NO. CV 81-1107 TJH

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Upon consideration of the moving papers in support of defendants' Summary Judgment Motion, and oral argument of counsel for the defendants and plaintiff, IT IS ORDERED under Fed. R. Civ. P. 56(b) that the following findings of fact and conclusions of law are without substantial controversy:

FINDINGS OF FACT

1. Probable cause existed to arrest and detain the plaintiff after she shoplifted cosmetic items from the J.C. Penney Store in the City Mall, in Orange, on or about January 25, 1979.

2. After placing the plaintiff under citizen's arrest, J. C. Penney store personnel contacted the Orange Police Department

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APPENDIX "C"

3. None of the defendants used excessive force against the plaintiff during her detention.

4. Officer Kenney received a business .ard from an unident fied individual (identified as "Mr. X" in the criminal proceedi which he beleives that he then gave to Officer Staton before le ing the store.

5. Officer Staton did not recall receiving this business c from Officer Kenney.

6. None of the defendants conspired to destroy this busines card, nor did any of them conspire to conceal the identity of "M X."

7. None of the defendants conspired to disperse witnesses connected with plaintiff's criminal trial.

8. None of the defendants committed perjury or conspired to commit perjury at plaintiff's criminal trial.

9. None of the defendants conspired to suppress any evidenc favorable to plaintiff's defense in connection with her criminal trial.

10. There was no conspiracy between J. C. Penney Company an the City of Orange Police Officers to deprive citizens of their constitutional rights.

11. All of the individual defendants in this action acted with good faith and with the reasonable belief that their action were legal in connection with the detention and arrest of plaint for shoplifting on January 25, 1979.

12. No one directed defendants Carol J. Manstrom or Marijan Ramstead on how to testify at plaintiff's November 1980 criminal

APPENDIX "C"

13. Plaintiff has willfully failed to obey previous Court orders regarding doscovery efforts of the defendants.

14. The plaintiff has willfully failed to prosecute this action.

15. Any Conclusion of Law more appropriately deemed to be a Finding of Fact is incorporated herein as a Finding of Fact.

CONCLUSIONS OF LAW

1. Plaintiff is collaterally estopped from raising any claims regarding perjury of the defendants because this issue decided in their favor during her previous criminal trial.

2. Since none of the individual defendants used excessive force against plaintiff and had probable cause to detain and arrest her, there was no violation of her civil rights under 42 U.S.C. § 1983.

3. Plaintiff is collaterally estopped from raising any claims regarding probable cause, dispersion of witnesses, the loss of evidence and the existence of excessive force because she was found to be guilty of petty theft and assault and batt at her criminal trial and these issues were resolved adversely against her at that trial.

4. Because plaintiff persistently and willfully refused t be deposed by defendants, this Court ruled on January 4, 1982, that her testimony would be excluded at time of trial. That testimony also cannot be introduced into evidence in connectio with defendants' Motion for Summary Judgment. In addition, th testimony of Mr. Frank Marchuk is also inadmissible because it hearsay.

5. Plaintiff has therefore failed to produce any admissible evidence sufficient to oppose defendants' Motion for Summary Judgment.

6. Plaintiff cannot maintain a cause of action against the City of Orange for violation of her civil rights because there has been no showing that the City endorsed or encouraged such conduct. Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

7. Plaintiff cannot maintain a cause of action against any of the private individuals for violation of her civil rights because there has been no showing that they were acting under color of state law.

8. Any Finding of Fact more appropriately deemed a Conclusion of Law shall be incorporated here as a Conclusion of Law.

DATED: June 18, 1982

Terry J. Hatter, Jr.
Terry J. Hatter, Jr.
United States District Judge

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PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, the undersigned declare:

That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Los Angeles, California, in which County the within-mentioned mailing occurred.

My business address is 550 South Hill Street, Suite 1300, Los Angeles, California 90013.

I served the following document:

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

of which THE ORIGINAL DOCUMENT, OR A TRUE AND CORRECT COPY, is attached, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

COURT OF APPEALS
OFFICE OF THE CLERK
P.O. Box 547
San Francisco, CA 94101

David R. Highman
P.O. Box 1786
Newport Beach, CA 92660

William P. Daley
555 W. Beech St.
Suite 400
San Diego, CA 92101

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 4, 1985, at Los Angeles, California.

Donna L. Osborne
DONNA L. OSBORNE

Supreme Court, U.S.
FILED
SEP 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1899

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

IRENE D. MUELLER,
Petitioner,
vs.
DAVID DIEBALL, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BEST AVAILABLE COPY

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF

STATEMENT OF LEGAL ISSUES

1. WHETHER THE UNCONTROVERTED DECLARATIONS OF RESPONDENTS RENDER THE DISTRICT COURT'S SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS PROPER.

2. WHETHER THERE IS ANY EVIDENCE CONTRARY TO THE FINDING BY THE DISTRICT COURT THAT THESE RESPONDENTS ACTED IN GOOD FAITH AND THAT THEY DID NOT ACT UNDER COLOR OF LAW.

STATEMENT OF THE CASE

1. Opinion Below

The Defendants-Respondents adopt the Plaintiff-Petitioner's statement of opinion below for purposes of this appeal alone.

2. Jurisdictional Statement

The Defendants-Respondents adopt the Plaintiff-Petitioner's jurisdictional statement for purposes of this appeal alone.

3. Statement of Relevant Facts

The Defendants-Respondents adopt the Plaintiff-Petitioner's statement of facts for purposes of this appeal alone.

ARGUMENT

1. The Petition Raises No Error in the Finding by the District Court For Summary Judgment in Favor of These Individual Respondents.

Petitioner's brief is distinguished by its complete lack of argument contesting the finding by the District Court in favor of these individual respondents. The entire thrust of petitioner's argument, in support of her Writ of Certiorari, is that the police officers negligently lost the identification card of a material witness, thereby depriving petitioner of due process and violating her civil rights. Respondents defer to and join in the response of the police officers to those issues which do not directly affect these respondents.

Petitioner, however, does not dispute in her Petition any of the Findings of Fact and Conclusions of Law by the District Court regarding these private defendants, including the following:

a. None of the defendants conspired to destroy this business card, nor did any of them conspire to conceal the identity of "Mr. X.";

b. All of the individual defendants in this action acted with good faith and with the reasonable belief that their actions were legal in connection with the detention and arrest of plaintiff for shoplifting on January 25, 1979; and

c. Plaintiff cannot maintain a cause of action against any of the private individuals for violation of her civil rights because there has been no showing that they were acting under color of state law. [Appendix "A" to Petition, pp. 3, 4 and 7].

Petitioner has made no showing at any stage of this litigation to controvert the Affidavits of these defendants upon which the aforementioned findings and conclusions were made. Nor does she contend in the instant petition that these defendants ever acted other than in good faith.

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit agreed that plaintiff could not maintain a cause of action under 42 *U.S.C.* § 1983 against any of the private individuals because there had been no showing that they were acting under color of state law. *Fonda v. Gray,* 707 F.2d 435, 438-39 (9th Cir. 1983) [Appendix "B" to the Petition, p. 4].

Plaintiff does not contest those findings in her Petition. It is respectfully submitted that plaintiff's reason for not raising any such issues is because she had no evidence to refute the finding by the District Court in favor of these defendants and therefore her Petition should be denied.

2. Respondents' Motion For Summary Judgment Determined That No Material Issues Were Present.

Plaintiff cites numerous cases for the proposition that she could rely upon movants' declarations in their motion for summary judgment to establish that genuine issues of fact existed and therefore the motions should be denied. However, she fails to outline where the declarations raised such issues. Further, plaintiff has never provided contrary evidence to question the declarations of these respondents to show that the District Court's decision was in error.

Further, *Henderson v. Fisher,* 631 F.2d 1115 (3rd Cir. 1980), involved a motion to dismiss under *F.R.C.P.* 12(b)(e) where the court evaluated conflicting evidence to find that sufficient facts existed for plaintiff to maintain her claim. No conflicting evidence exists here.

Plaintiff's reliance upon *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 90 S. Ct. 1598 (1969) is also misplaced. Respondents concur that a motion for summary judgment must establish the absence of a genuine issue of fact; that case found that triable issues existed based upon examination of other evidence presented including affidavits and plaintiff's deposition.

No contrary evidence has ever been submitted by Irene Mueller. The Supreme Court in *Adickes, supra,* stated at page 160:

> If respondent had met its initial burden . . . Rule 56(e) would then have required petitioner to have done more than simply rely on the contrary allegation in her complaint.

Respondents submit that Irene Mueller had no contrary evidence to dispute the facts upon which the summary judgment was granted.

CONCLUSION

It is respectfully submitted that no error exists nor is any being asserted by plaintiff against these respondents. The findings and conclusions by the District Court were made upon competent evidence. These defendants at all times acted in good faith and plaintiff failed to meet her burden to show that their acts were done under color of state law to allow her to maintain an action against them under 42 *U.S.C.* § 1983. The Petition for Writ of Certiorari should be denied.

DATED: September 4, 1985

Respectfully submitted,

JOHNSON, HIGHMAN & JOHNSON

By: DAVID R. HIGHMAN
Attorneys for Respondents Carol J. Manstrom, Valerie Rich Johnson, Dolores Mae Carson, Marijane Ramstead, Ted Chatterton, Liberty Mutual Insurance Company and J. C. Penney Company, Inc.